BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to Evaluate Telecommunications Corporations Service Quality Performance and Consider Modification to Service Quality Rules.	R.11-12-001 (Issued December 1, 2011)

PETITION FOR MODIFICATION OF D.16-08-021 AND G.O. 133-D

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Pursuant to Commission Rule of Practice and Procedure 16.4, the California Association of Competitive Telecommunications Companies ("CALTEL") respectfully petitions the Commission to modify D.16-08-021 (the "Decision") and General Order 133-D and find that CLECs should only be fined for failures to meet service quality measures if the failure was primarily due to the CLEC's action or inaction, and not because of service or facility issues of an unaffiliated underlying carrier. The Decision's determination that CLECs have contractual recourse against underlying facilities-based carriers that caused the CLEC to fail to meet a service quality measure and be subject to fines is both legally and factually incorrect.

Due to the urgent need of affected CLECs to assess the impact of potential fines on their current and future business plans, including the ability to raise capital for expansion of services, CALTEL is filing this Petition for Modification.[1] CALTEL respectfully requests that the Commission act on this Petition as soon as possible, but no later than the date that the penalty mechanism goes into effect (January 1, 2017).

I. INTRODUCTION

In D.16-08-021, the Commission adopted General Order 133-D, which imposes automatic fines for failure of URF LECs, including CLECs, to meet three service quality standards. Two of those standards apply to maintenance and repair measures: Customer Trouble Reports and Out-of-Service Repair Interval.

As CALTEL has previously explained, the overwhelming majority of CLEC service outages involve "last-mile" facilities leased from a large ILEC like AT&T or Verizon (now Frontier), for which the large ILEC provides all maintenance and repair. As a result, the duration

[1] To preserve its appellate rights, CALTEL plans to also timely file a rehearing application. Of course, by filing this Petition, CALTEL does not waive any rights or claims with respect to the validity of the Decision and its factual and legal inconsistency with prior approvals and decisions of this Commission.

of CLEC customer outages arising from issues with ILEC last mile facilities will never be less than the time it takes for the ILEC to dispatch a technician and restore service.[2]

The OIR that opened this proceeding specifically recognized CALTEL's description of this nexus between retail and wholesale service quality, and the impact of poor performance by AT&T and Verizon (now Frontier) on competitive carriers, and on competition:

> …since CLECs rely on copper facilities owned by URF ILECs, deteriorating facilities and extended out-of-service repair times negatively impact customer choice by increasing costs of CLECs through compensating customers to restore confidence in their service. If this confidence cannot be restored, it creates an anti-competitive environment by removing CLECs as a viable alternative to the URF ILECs.[3]

The Decision essentially determines that CLECs should incur *even more costs* by being subject to fines for failures to meet performance measure standards over which they indisputably have no control. The Decision erroneously determines that this is an acceptable outcome because CLECs have "recourse against underlying facilities-based providers that provide substandard service through contractual agreements."[4]

Neither AT&T nor Frontier rebutted these facts in their reply comments on the PD.[5] In addition, the Joint Consumers (TURN, Greenlining and the Center for Accessible Technology) have consistently provided additional support for CALTEL's position, including in their reply

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[2] CALTEL Opening Comments on the Proposed Decision of Commissioner Picker Adopting General Order 133-D, dated April 11, 2016, at p. 2. ("CALTEL Opening Comments")

[3] OIR at p. 11.

[4] Decision at pp. 17-18.

[5] AT&T did not address CALTEL's comments in its reply comments on the PD. Frontier stated that "CALTEL…proposes a somewhat similar modification that would apply only to CLECs and only to delays allegedly caused by ILECs. Frontier does not agree with CALTEL's arguments, but Frontier believes its proposal would allow the Commission to address a variety of unique circumstances, not circumstances limited to a particular class of providers." Reply Comments of Citizens Telecommunications Company et al on Proposed Decision Issued March 22 2016 at p. 3.

comments on the PD.[6] Nonetheless, the Decision fails to discuss these concerns, and provides no Finding of Fact or Conclusion of Law that addresses this issue, let alone explains why this determination is valid in light of the relevant facts.

The APD of Commissioner Sandoval found that "for CLECs, we will only apply the penalty mechanism if the failure to meet service quality standards was primarily due to the CLEC's action or inaction, not service or facility issues of an unaffiliated underlying carrier."[7] None of the three commissioners supporting the PD over the APD identified this alternative language as a determining factor in their comments at the August 18, 2016 voting meeting. Accordingly, and for the reasons stated more fully below, CALTEL respectfully requests that the Commission modify D.16-08-021 and G.O. 133-D as proposed in the APD and documented in Attachment A.

II. DISCUSSION

A. CLECs Do Not Have Contractual Recourse Against Underlying Carriers

The Decision contains only one paragraph that addresses the issue of mitigation of fines for CLECs that miss performance measures and are subject to fines due to the substandard performance of underlying facilities-based providers:

> The CLECs argue that they should not be fined on the underlying carrier's performance. Staff reasoned that the CLECs have a responsibility to provide safe and reliable service to their customers, and customers are indifferent to the underlying source of their service. *CLECs have recourse against their underlying facilities-based providers that provide substandard service through contractual agreements.*[8] (emphasis added)

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[6] *See* Reply Comments of Center for Accessible Technology, the Greenlining Institute, and the Utility Reform Network on Decision Adopting General Order 133-D, dated April 18, 2016, at p. 3. *See also* Reply Comments of Center for Accessible Technology, the Greenlining Institute, and the Utility Reform Network on Assigned Administrative Law Judge's Ruling Setting Dates for Comments and Reply Comments on Staff Proposal, April 17, 2015, at 15.

[7] APD at pp. 41-42.

[8] Decision at pp. 17-18.

In its April 11, 2016 comments on the PD that led to the Decision, CALTEL explained why the last sentence in this paragraph is unfortunately not accurate for a number of reasons, the most important being that the Commission itself has unequivocally found otherwise.

1. The Only Recourse for Substandard Performance in Section 252 Agreements is the Performance Improvement Plan (PIP)

As background, the only last-mile circuits used by facilities-based CLECs to serve residential and small business customers (i.e. the types of CLECs and customers that fall within the parameters of the G.O. 133-D maintenance measures) are unbundled copper loops. These facilities are provided by ILECs to CLECs only because Section 251(c) of the 1996 Telecom Act (Act) requires that they be, making the only applicable "contractual agreements" Interconnection Agreements (ICAs) mandated by Section 252.

CALTEL explained that the only "recourse" for substandard performance in these ICAs is the Performance Improvement Plan (PIP) adopted by the Commission in 2002. The Decision does not include any evidence showing why CALTEL's claim was incorrect.

That is because there is no other path for pursuing recourse for damages in these contracts. Using Sonic Telecom's ICA with AT&T as an example,[9] the agreement specifies that:

> **AT&T CALIFORNIA**'s agreement to implement this Remedy Plan will not be considered as an admission against interest or an admission of liability in any legal, regulatory, or other proceeding relating to **AT&T CALIFORNIA**'s performance. **AT&T CALIFORNIA** and CLEC agree that CLEC may not use the existence of this Plan as evidence that **AT&T CALIFORNIA** has discriminated in the provision of any facilities or services under Sections 251 or 252, or has violated any state or federal law or regulation. **AT&T CALIFORNIA**'s conduct underlying its performance measures, and the performance data provided under the performance measures, however, are not made inadmissible by these terms. Any CLEC accepting this Remedy Plan agrees that **AT&T**

[9] *See* https://clec.att.com/clec_cms/clec/docs/97cc59bab5ad4b0db5d749f9a142aef2.pdf ("AT&T/Sonic ICA").

> **CALIFORNIA**'s performance with respect to this Plan, including the payment of remedies under this Plan, may not be used as an admission of liability or culpability for a violation of any state or federal law or regulation.[10]

The ICA further specifies that1) payments under the PIP are "not indirect, incidental, consequential, reliance, or special damages"[11], and 2) the incentive payments constitute liquidated damages which "are not a penalty" and which "constitute a reasonable approximation of the damages (the CLEC) would sustain if its damages were readily ascertainable."[12]

The Verizon ICAs that Frontier assumed have a provision that permits a party to seek indemnification from the other only for physical damage or loss to person or property, and then only where the party seeking indemnification can prove gross negligence or intentionally negligent wrongful acts by the party from whom indemnification is sought:

> Each Party ("Indemnifying Party") shall indemnify, defend and hold harmless the other Party ("Indemnified Party"), the Indemnified Party's Affiliates, and the directors, officers and employees of the Indemnified Party and the Indemnified Party's Affiliates, from and against any and all Claims that arise out of bodily injury to or death of any person, or damage to, or destruction or loss of, tangible real and/or personal property of any person, to the extent such injury, death, damage, destruction or loss, was proximately caused by the grossly negligent or intentionally wrongful acts or omissions of the Indemnifying Party, the Indemnifying Party's Affiliates, or the directors, officers, employees, Agents or contractors (excluding the Indemnified Party) of the Indemnifying Party or the Indemnifying Party's Affiliates, in connection with this Agreement.[13]

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[10] *Id.* at p. 588.

[11] *Id.* at p. 24.

[12] *Id.* at p. 219. Liquidated damages are a "specific sum of money [that] has been expressly stipulated by the parties to a bond or other contract as the amount of damages to be recovered by either party for a breach of the agreement by the other." Black's Law Dictionary, Rev. 4th Ed. at p.468. Calif. Civ. Code 1671(b) validates liquidated damages provisions in commercial agreements except under very limited circumstances.

[13] Verizon did not maintain an online portal for approved ICAs, and it appears that the Frontier CLEC website only contains ICAs for the states of Nevada and New Mexico. CALTEL had in its possession file copies of several Verizon ICAs submitted to the Commission for approval, as well as an ICA template agreement that Verizon used to begin ICA negotiations with CLECs. This language appears in paragraph 20.1 of all of those documents.

Review of this ICA and others demonstrates that CLECs do not have access to effective contractual recourse for maintenance and repair outages.

2. The PIP Applies Only to One of the Four URF ILECs

Moreover, the remedy plan adopted by the Commission in 2002 *applies only to AT&T.*[14] The Commission documented its intention to adopt a penalty plan for Verizon in the decision adopting the AT&T PIP:

> While we have intended to adopt simultaneously the same plan for Verizon as we adopt for Pacific, as Verizon notes in its comments on the DD, most of our analyses in this decision have been performed for Pacific. We could delay adoption of a plan for Pacific while we perform additional analyses for Verizon, but do not wish to delay Pacific further…so to prevent undue delay to Pacific, we will adopt this performance incentives plan only for Pacific at this time. We intend to adopt this plan for Verizon, by means of a separate decision, within the next few weeks pending further analyses.[15]

However, the Commission never followed through, and as a result there is no penalty plan in place for Verizon or its successor, Frontier.

Thus, CLECs that become liable for automatic fines for outages caused by the failure of Frontier California to repair underlying facilities in a timely manner have no recourse under a PIP available to them.

3. In Adopting the PIP, the Commission Found that Incentive Payments Did Not Constitute "Fair Compensation" to a Harmed CLEC

Next, CALTEL explained that while the Commission expressed its hopes that the AT&T PIP would incentivize good wholesale performance, the Commission also clearly recognized that it would not provide full protection against potential anti-competitive behavior by AT&T:

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[14] D.02-03-023, Opinion on the Performance Incentives Plan for Pacific Bell Telephone Company, Issued March 7, 2002 ("AT&T PIP Decision").

[15] *Id.* at pp. 78-79.

> Given the level at which we set the payments or billing credits today, we consider them to be an inducement of appropriate market behavior rather than penalties. This record does not support the determination that the incentive payments will be "fair compensation" to a harmed CLEC. What constitutes fair compensation to the CLECs would be extremely difficult to calculate. Moreover, the goal of the proceeding is not to provide "insurance" payments to a CLEC (that it will receive fair compensation while it is being discriminated against), but to ensure that there is a competitive market.[16]

Thus, the Decision's conclusion that CLECs have sufficient recourse in contractual agreements with ILECs is inconsistent with the Commission's clear understanding in setting up the compensation mechanism that it would not be sufficient to make CLECs whole in the face of ILEC transgressions.

4. There is No Calibration between GO 133D Fines and AT&T PIP Incentive Payments and No Analysis of Applicable Provisions of ILEC-CLEC Interconnection Agreements

CALTEL also explained that there is no calibration in the Decision of the potential penalties CLECs may face under the Decision and the compensation potentially available from AT&T for violations of the PIP. The Decision does not provide any evidence that indicates that Commission staff attempted to calculate potential CLEC fines and compare them with potential incentive payments under the PIP.

Moreover, the Commission's conclusion that CLECs have contractual remedies is devoid of any reference to any actual ILEC-CLEC interconnection agreement (ICA) or provision, even though all such Section 251 agreements have been disclosed to and approved by the Commission. As discussed, had the Commission actually reviewed relevant ICAs, it would have discovered that these supposed contractual remedies are illusory.

[16] *Id.* at pp. 61.

5. AT&T Can Use *Force Majeure* Declarations to Eliminate PIP Incentive Payments for Outages that the CLEC Will Still be Liable For

CALTEL provided a specific example of when these amounts will not be calibrated. The ability of ILECs to declare a *force majeure* condition under AT&T's wholesale performance measurement plan and obtain broad exemptions from making incentive payments for extended periods of time further reduces a CLEC's hope for any type of meaningful recourse.

Although AT&T did not address this (or any other of CALTEL's claims) in its comments on the PD, it did assert earlier in this proceeding that CALTEL did not understand the Force Majeure process, and that the PIP "provides a process for AT&T to present a case for relief from incentive payments due to unusual circumstances, which process begins with negotiations with the affected CLECs, followed by Commission arbitration."[17]

AT&T provided no reference to where this collaborative process appears in the PIP, and that is because it does not. The PIP simply states that "Force majeure events will be treated as excludable events," and provides no other process details.[18] "Force Majeure" is defined as follows in the "Definitions" section of the AT&T ICA:

> Force Majeure
>
> Neither Party shall be liable for any delay or failure in performance of any part of this Agreement from any cause beyond its control and without its fault or negligence including, without limitation, acts of nature, acts of civil or military authority, government regulations, embargoes, epidemics, terrorist acts, riots, insurrections, fires, explosions, earthquakes, nuclear accidents, floods, work stoppages, equipment failure, cable cuts, power blackouts, volcanic action, other major environmental disturbances, unusually severe weather conditions, inability to secure products or services of other persons or transportation facilities or acts or omissions of transportation carriers. In such event, the Party affected shall, upon giving prompt notice to the other Party, be excused from such performance on a day-to-day basis to the extent of such interference (and the other Party shall likewise be excused from performance of its obligations on a day-for-

[17] Reply Comments of AT&T California and Certain of Its Affiliates, dated March 1, 2012, at pp. 25-26.
[18] AT&T PIP Decision at Appendix A, Section 5.6 at p. 6.

day basis to the extent such Party's obligations related to the performance so interfered with). The affected Party shall use its best efforts to avoid or remove the cause of nonperformance and both Parties shall proceed to perform with dispatch once the causes are removed or cease. In the event of such performance delay or failure by the affected Party, the affected Party agrees to resume performance in a nondiscriminatory manner and not favor its own provision of telecommunications services above that of the other Party.[19]

Thus, the Decision's conclusion that "CLECs have recourse against their underlying facilities-based providers that provide substandard service through contractual agreements" is legally and factually incorrect for the reasons identified by CALTEL.

B. The Decision Does Not Contain Any Discussion of CALTEL's Comments, or Any Finding of Fact or a Conclusion of Law to Support Its Determination

As noted above, the final Decision does not contain any indication that CALTEL challenged the legal or factual basis of the PD's determination. Furthermore, there is also no Finding of Fact or Conclusion of Law that addresses, let alone supports, the Commission's determination that CLECs have "recourse against underlying facilities-based providers that

[19] AT&T/Sonic ICA at pp. 25-26. Although alternate language appears in ICAs for which the CLEC opted in to the agreement arbitrated between AT&T's pre-merger CLEC entity and Pacific Bell (vs. the agreement arbitrated between MCI Communications and Pacific Bell), it is equally unavailing:

"17.1 Neither Party shall be responsible for delays or failures in performance resulting from acts or occurrences beyond the reasonable control of such Party, regardless of whether such delays or failures in performance were foreseen or foreseeable as of the date of this Agreement, including, without limitation: fire, explosion, acts of God, war, revolution, civil commotion, or acts of public enemies; any law, order, regulation, or ordinance of any government or legal body; strikes; acts or omissions of a Party's subcontractors, material men, suppliers or other third persons providing products or services to such Party; or delays caused by the other Party or any other circumstances beyond the Party's reasonable control. In such event, the Party affected shall, upon giving prompt notice to the other Party, be excused from such performance on a day-to-day basis to the extent of such interference (and the other Party shall likewise be excused from performance of its obligations on a day-for-day basis to the extent such Party's obligations relate to the performance so interfered with). The affected Party shall act in good faith to avoid or remove the cause of non-performance and both Parties shall proceed to perform with dispatch once the causes are removed or cease.

17.2 Notwithstanding subsection 17.1, preceding, no delay or other failure to perform shall be excused pursuant to this Section by the acts or omissions of a Party's subcontractors, material men, suppliers or other third persons providing products or services to such Party unless such acts or omissions are themselves the product of a Force Majeure condition or unless such acts or omissions are beyond the reasonable control of such Party." U.S. TelePacific/AT&T ICA at https://clec.att.com/clec_cms/clec/docs/bde09aad57354b21ab29a2f07e555489.pdf , p. 25.

provide substandard service through contractual agreements."

Accordingly, CALTEL respectfully submits that the Decision must be modified to correct the legally and factually erroneous determination noted above.

III. Conclusion

For the reasons discussed above, CALTEL respectfully submits that D.16-08-021 and G.O. 133-D be modified as shown in Attachment A.

Respectfully submitted,

August 30, 2016

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Attachment A

Requested Modification to Decision at pp. 17-18:

The CLECs argue that they should not be fined on the underlying carrier's performance. Staff reasoned that the CLECs have a responsibility to provide safe and reliable service to their customers, and customers are indifferent to the underlying source of their service. CLECs have recourse against their underlying facilities-based providers that provide substandard service through contractual agreements.

Since those contractual remedies may take time and may not be sufficient to incentivize timely performance by URF ILECs or unaffiliated underlying carriers that ensures the public safety of customers, facilities-based CLECs will only be subject to penalties imposed by this Decision if the failure to meet service quality standards was primarily due to the CLEC's action or inaction, and not primarily due to service or facility issues of an unaffiliated underlying carriers.
Joint Consumers agreed with CALTEL that the CLECs should not pay the price for the ILEC's failure to meet service quality standards. They agreed with CALTEL's recommendation that the Commission implement rules to ensure that "any fines imposed on CLECS for the OOS maintenance measure only include the portion of those outages over which the CLEC has direct control." Accordingly, CLECs shall report when outages are caused by an unaffiliated underlying carrier, and the Commission can take this fact into account when analyzing responsibility for the outage and appropriate Commission action including any penalties.

Requested Addition to Findings of Facts:

It is reasonable to subject CLECs to penalties imposed by this Decision only if the failure to meet service quality standards was due to the CLEC's action or inaction, and not primarily due to service or facility issues of an unaffiliated underlying carriers.

Requested Modification to General Order 133-D

9. FINES
Applies to facilities-based telephone corporations that offer TDM based voice service and have been granted either a franchise or a Certificate of Public Convenience and Necessity (CPCN) pursuant to Public Utilities Code § 1001 or are registered pursuant to Public Utilities Code §1013, and are regulated under the Uniform Regulatory Framework (URF) adopted in D.06-08-030. For companies that offer both TDM and VoIP based services, fines apply only to TDM-based service.
For CLECs, the penalty provisions of this General Order will be imposed only if the failure to meet service quality standards was due to the CLEC's action or inaction, and not primarily due to service or facility issues of an unaffiliated underlying carriers.